AMI 307

ISSUES – NONPARTY FAULT

(Defendant) claims and has the burden of proving that (nonparty person or entity) [was][were] at fault and that [his][her][its][their] fault was a proximate cause of (plaintiff's) injuries.

Even though (nonparty person or entity) [is][are] not a party to this case, you are to determine whether (defendant) has met that burden. If you find that (defendant) has met that burden, you are to determine to what extent (nonparty person's or entity's) fault contributed to (plaintiff's) injuries, expressed as a percentage of 100 percent.

The fault of any one person or entity may be greater or lesser than that of another, or may be zero, but the total amount of fault, if you find any, must add up to 100 percent. This will be clear from the verdict form.

NOTE ON USE

This instruction may not be given until January 1, 2015.

This instruction applies to actions for personal injury, medical injury, wrongful death, or property damage in which the defendant seeks allocation of fault to nonparties.

This instruction is to be given only if the court finds that:

1. the defendant has satisfied the notice requirements of Ark. R. Civ. P. 9(h) or the plaintiff has entered into a settlement agreement with the nonparty to whom the defendant seeks to allocate fault as provided in Ark. R. Civ. P. 49(c)(1)(A); and

2. the defendant has carried the burden of establishing a *prima facie* case of the nonparty's fault as provided in Ark. R. Civ. P. 49(c)(1)(B).

An interrogatory based on the sample provided in AMI 307A is to be given in conjunction with this instruction. This instruction and AMI 307A assume that appropriate instructions – including those governing the definition of fault (AMI 301), the applicable standard and burden of proof (AMI 202 and 203), the applicable standard of care (e.g., AMI 303 and 305 for negligence or AMI 1008 for strict products liability), and proximate cause (e.g., AMI 501) – have been given.

COMMENT

In the wake of developments regarding the allocation of nonparty fault – including Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, 308 S.W.3d 135; ProAssurance Indemnity Co. v. Metheny, 2012 Ark. 461, 425 S.W.3d 689; St. Vincent Infirmary Med. Ctr. v.

Shelton, 2013 Ark. 38, 425 S.W.3d 761; the Civil Justice Reform Act, Act 649 of 2003 ("CJRA"), Ark. Code Ann. § 16-55-201 *et seq.*; Act 1116 of 2013, amending the Uniform Contribution Among Joint Tortfeasors Act ("UCATA"), Ark. Code Ann. § 16-61-201 *et seq.* – the Arkansas Supreme Court in August 2013 appointed a Special Task Force on Practice and Procedure in Civil Cases "to review and consider changes to court rules pertaining to parties, liability, and damages in civil litigation involving negligence, medical malpractice, and related cases." In re Special Task Force on Practice and Procedure in Civil Cases, 2014 Ark. 5 (per curiam) (publishing Special Task Force's Interim Report). Among the issues taken up by the Special Task Force was allocation of fault to nonparties. The Special Task Force's Interim Report included proposed amendments to Rules 9, 49, and 52, to provide procedures for nonparty-fault allocation. The Arkansas Supreme Court's Committee on Civil Practice endorsed those proposed amendments, subject to the addition of several terms. By per curiam order of August 7, 2014, the Arkansas Supreme Court adopted the proposed amendments, as modified by the Committee on Civil Practice. In re Special Task Force on Practice and Procedure in Civil Cases – Ark. R. Civ. P. 9, 49, 52, and Ark. R. App. P. - 8, 2014 Ark. 340 (hereafter "August 7, 2014, per curiam").

This instruction is based on the August 7, 2014, per curiam order. The court characterized those amendments as "proposed to address allocation of fault, including nonparty fault, which arises under the provisions of Act 649 of 2003 and Ark. Code Ann. §§ 16-61-201 and 16-61-2-2(c), as amended by Act 1116 of 2013" and to "fill the procedural void resulting from the procedural aspects of Act 649 that were struck on separation-of-powers grounds." *Id.* at 1, *citing* Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, 308 S.W.3d 135. The amendments' effective date is January 1, 2015.

Under the amendments to Ark. R. Civ. P. 9, 49, and 52, fault may be allocated to nonparties via one of two routes – upon settlement with that nonparty or upon notice – and in either case the party seeking fault-allocation must produce sufficient evidence to establish a *prima facie* case of the nonparty's fault. Those are the only means by which fault may be allocated to nonparties. Ark. R. Civ. P. 9(h)(4). In the absence of a settlement, the party seeking fault-allocation to a nonparty must give notice that the nonparty was wholly or partially at fault, either in the first responsive pleading, if the factual and legal basis for fault allocation is then known, or, if not, in a supplemental pleading after the party discovers such information. Notice must identify the nonparty sufficiently to permit service of process (regardless of whether service is possible or *in personam* jurisdiction can be established), and satisfy fact-pleading requirements regarding nonparty fault. Ark. R. Civ. P. 9(h)(2). If the claimant has settled with a nonparty, the party seeking to have fault allocated to that nonparty need not give notice. Ark. R. Civ. P. 9(h)(1). If the foregoing requirements are satisfied, Rule 49(c)(2) provides that "[t]he jury shall allocate the fault, on a percentage basis, among those persons or entities, including those not made parties, found to have contributed to the injury, death, or property damage." Rule 52(a)(2) includes a corresponding provision for bench trials. Allocation of fault to nonparties is to be used only to determine the parties' percentage of fault and is not to be used as a basis for nonparty liability. Ark. R. Civ. P. 49(c)(3). These provisions resemble those described in Restatement (Third) of Torts: Apportionment of Liability § B19, cmt. b-c.

This instruction draws on nonparty fault instructions from other states. *E.g.*, Ariz. Pattern Jury Instr. – Civil, Fault 11; Colo. Jury Instr. 4th – Civil 9:29A; Michigan Non-Standard Jury Instr. Civil § 16:53; Tenn. Prac. Pattern Jury Instr. – Civil 3.53 (2013 ed.).

By providing a procedural mechanism for fault allocation in multi-tortfeasor cases, including those involving tortfeasors not joined as parties, the August 7, 2014, per curiam fills much of the "procedural void" that resulted after *Johnson*. The per curiam also contemplates, in delaying the effective date until January 1, 2015, that the Committee on Model Jury Instructions – Civil would "consider the impact of these changes on jury instructions." August 7, 2014, per curiam, *supra*, 2014 Ark. 340 at 2.

New Rule 9(h)(2) alters terms originally provided in the CJRA, Ark. Code Ann. § 16-55-202(a) and (b). The requirement that nonsettling nonparties must be sufficiently identified to permit service of process effectively precludes assignment of fault to unidentified or minimally identified tortfeasors. The CJRA, Ark. Code Ann. § 16-55-202(b)(2), required only the "best identification of the nonparty which is possible under the circumstances." And the new Rule's requirement that the defendant "state in ordinary and concise language facts showing that the nonparty is at fault" is more stringent than subsection 202(b)(2)'s requirement of a "brief statement of the basis for believing the nonparty is at fault." For elaboration, see Ark. R. Civ. P. 9, Addition to Reporter's Notes (2014 Amendment), in August 7, 2014, per curiam, *supra*, 2014 Ark. 340 at 6-7. Further, the Addition to the Reporter's Notes (2014 Amendment) states that the "procedural section" of the UCATA, concerning third-party practice, Ark. Code Ann. §16-61-207, is superseded by Rules 9(h), 13, and 14. Finally, Rule 9(h)(4) implicitly reinforces the court's observation in *Shelton*, *supra*, 2013 Ark. 38 at 11-12, about evidence of nonparty fault: "This subdivision does not prohibit a party from introducing evidence on any issue."

At least two questions remain. One, which concerns fault-apportionment in those multiple-tortfeasor cases that also involve allegations of plaintiff's fault, is discussed in the Comment to AMI 307A. The other question concerns the scope of nonparty fault. This issue, which arises from the interaction of the CJRA, Act 1116 of 2013, *Johnson*, and the August 7, 2014, per curiam, is whether fault may be allocated to nonparties who are immune from suit or beyond the court's jurisdiction and thus whether this instruction may be given in such cases. It persists because of the unusual route Arkansas law on nonparty fault has traveled.

One way to frame the question is to ask whether anything remains, after *Johnson* and the 2014 amendments to the Arkansas Rules of Civil Procedure, of the original policy choice concerning the scope of nonparty fault reflected in subsection 202(a) of the CJRA, which provided for assessment of the percentage of fault of "all persons or entities who contributed" to plaintiff's damages "regardless of whether the person or entity was or could have been named as a party to the suit." That provision arguably included nonparties who could not be held liable, such as employers immune from liability under the exclusive-remedy provision of the workers' compensation statute or nonparties against whom the limitations period has run, or nonparties who could not be subjected to jurisdiction, such as foreign manufacturers of defective products. For description of this issue, see Samuel T. Waddell, Comment, *Examining the Evolution of Nonparty Fault Apportionment in Arkansas: Must a Defendant Pay More Than its Fair Share?*,

66 ARK. L. REV. 485, 498-505 (2013); Robert B Leflar, *The Civil Justice Reform Act and the Empty Chair*, 2003 ARK. L. NOTES 67, 68 (2003).

The practical reach of CJRA's replacement of joint and several liability with a modified form of proportional liability, originally effectuated through statutory provision for allocation of nonparty fault (including to nonparties who could not be held liable), was limited by the series of court rulings cited in the first paragraph of this Comment. Two of those cases, *Metheny* and *Shelton*, also significantly limited the availability of contribution under the UCATA as a statutory mechanism for achieving proportional liability. *Shelton* in particular did so by interpreting the UCATA term "joint tortfeasor" in such a way that the CJRA's abolition of joint and several liability also extinguished a right of contribution under the UCATA.

Act 1116 amended the UCATA, among other purposes, in effect to overrule *Shelton* and reinstate a right to contribution, and to provide for allocation of nonparty fault. It did so in two ways. First, Act 1116 redefined "joint tortfeasors" as those persons or entities, "including those not made parties, *who may have joint liability or several liability in tort for the same injury*" to the plaintiff "whether or not judgment has been recovered against all or some of them" and "several liability" to mean proportional liability. Ark. Code Ann. § 16-61-201 (emphasis added). Second, Act 1116 provided that the right of contribution "includes the right to an allocation of fault as among all joint tortfeasors" as well adjustment in the event of settlement. Ark Code Ann. § 16-61-202(c). Unlike the CJRA, however, Act 1116 did not include provisions to implement that right. New Rules 9(h), 49(c), and 52(a)(2) provide those mechanisms. Thus, what began as a legislative effort to shift Arkansas tort law from joint and several liability to proportional liability, which apparently included allocation of fault to nonparties regardless of whether they could be held liable, became expressed as a right of contribution defined in terms of potential liability and implemented through amendments to the Rules of Civil Procedure. But, as explained below, those new rules are based not only on Act 1116 but also on subsection 202(a) of the CJRA.

Uncertainty about subsection 202(a)'s status also derives from *Johnson* itself. *Johnson* not only struck subsection 202(b) of the CJRA, which "instructs when the negligence or fault of a nonparty shall be considered," but also held that, "because it is dependent on (b)," subsection 202(a) "falls as well." 2009 Ark. 241 at 8, 308 S.W.3d at 141. The basis for the court's ruling was that the legislature, in "setting up a procedure to determine the fault of a nonparty and mandating the consideration of that nonparty's fault in an effort to reduce a plaintiff's recovery," had usurped the court's exclusive power with respect to rules of pleading, practice, and procedure. *Id.* The 2014 amendments to the Arkansas Rules of Civil Procedure, because court-promulgated, avoid that constitutional problem. Their purpose, however, is oriented to the same overall end the court attributed to subsection 202: to set up a procedure to determine nonparty fault, consideration of which can reduce a plaintiff's recovery. The August 7, 2014, per curiam characterizes *Johnson* as invalidating the "procedural" aspects of the CJRA. As described above, new Rule 9(h) specifically makes different choices than those reflected in CJRA subsection 202(b), the most plainly "procedural" provision, about the identification of nonparties and statement of facts. Those choices, as *Johnson* itself suggests, relate to the contents of

pleadings. 2009 Ark. 241 at 8, 308 S.W.3d at 141. It is less clear, however, on which side of the *Johnson* divide between procedure and substance that subsection 202(a)'s original policy choice concerning the scope of nonparty fault falls now that subsection 202(b)'s unconstitutionally initiated procedures have been supplanted by court rule, or whether that choice, if completely vitiated by *Johnson*, has been reincarnated by the 2014 amendments to the rules.

The 2014 amendments do not definitively resolve the question. New Rule 49(c), which the August 7, 2014, per curiam characterized as part of the mechanism "to fill the procedural void resulting from the procedural aspects" of the CJRA struck down in *Johnson*, is, as the Reporter's Note put it, "based in part on section 2 of Act 649 of 2003, codified at Ark. Code Ann. § 16-55-202(a), which was invalidated on separation-of-powers grounds" in *Johnson*. Addition to Reporter's Notes (2014), August 7, 2014, per curiam, 2014 Ark. 340 at 8. The amendment, according to the Reporter's Note, thus is based on the CJRA section originally reflecting the policy choice to allocate fault even to those nonparties who could not be held liable. New Rule 49(c) takes its language not from subsection 202(a) of the CJRA, however, but from the definition of "joint tortfeasor" in Act 1116's amendment to the UCATA, Ark. Code Ann. § 16-61-201(1). As noted above, under that provision, fault may be allocated to "all persons and entities, including those not made parties, *who may have joint liability or several liability*." (Emphasis added.) The Reporter's Note says as much: "The italicized language is taken from Ark. Code Ann. § 16-61-201 and is intended to be coextensive with the statute." Addition to Reporter's Notes (2014), August 7, 2014, per curiam, 2014 Ark. 340 at 9. Yet that Note also says, "[i]n tracking the statutory language, the rule is neutral on questions as to its scope, *e.g.*, whether the phrase 'may have joint liability or several liability' includes persons who are immune from suit or are beyond the court's jurisdiction." And new Rule 9(h)(1), in language added by the court's Civil Practice Committee, provides for fault allocation to nonparties not only under Ark. Code Ann. § 16-61-202(c), which includes fault-allocation as part of the right of contribution, but also pursuant to "any other statute providing a substantive right to do so."

Finally, it is not clear that the same answer obtains under Arkansas law with respect to various categories of nonparties. The Arkansas Supreme Court has ruled, before the CJRA's abolition of joint and several liability and the ensuing complications noted above regarding contribution, that the exclusive-remedy policy of the workers' compensation statute prevails over the UCATA to immunize employers from liability for contribution. W.M. Bashlin Co. v. Smith, 277 Ark. 406, 423, 643 S.W.2d 526, 534 (1982). It remains to be seen how the court will reconcile that ruling, the statutory framing of nonparty-fault allocation in Act 1116 of 2013 as a right of "contribution" under the UCATA, and the other interpretive issues outlined above. With respect to foreign entities not subject to *in personam* jurisdiction, the interpretive questions will include whether Rule 49(c)'s phrase "may have joint liability or several liability" requires only that the plaintiff have a cause of action against such entity or whether it also requires that the entity be amenable to suit. As for nonparty tortfeasors against whom the limitations period has run, the question may turn on whether allocation of fault to such nonparties is regarded as similar to a defendant's third-party claim for contribution from a tortfeasor against whom the period has run. For one case applying Arkansas law in the latter context, see Schott v. Colonial Baking Co.,

111 F. Supp. 13, 22-24 (W.D. Ark. 1953) (treating expiration of the limitations period as having the same effect on defendant's contribution claim as a voluntary release by plaintiff: "action or inaction on the plaintiff's part should not destroy the third party plaintiff's right of contribution").

For discussion of the scope of nonparty fault, including allocation to those who are legally or practically immune, see generally Restatement (Third) of Torts: Apportionment of Liability §B19 cmt. c, e, l, (2000); Uniform Apportionment of Tort Responsibility Act § 9 (2003); Dan B. Dobbs, et al., The Law of Torts § 495 (2d ed., updated June 2014); 1 Comparative Negligence Manual §§ 12:47, 14:9 (3d ed., updated Mar. 2013).